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## Cases of Note -- Unconscionability in Attorney's Fees and an Amazing Traipse Through Rock 'n Roll History

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# LEGAL ISSUES



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## Cases of Note — Unconscionability in Attorney's Fees and an Amazing Traipse Through Rock 'n Roll History

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**Edward King v. Lawrence Fox**, United States Court of Appeals for the Second Circuit, 418 F.3d 121; 2005 U.S. App. LEXIS 15846 (2005).

*This case involves copyright litigation, but doesn't advance your knowledge of copyright law in the least. Rather it is a gripping cautionary tale about leaping at contingency agreements without thinking them through.*

*And sometimes amidst the excruciating boredom of reading appellate cases you run across a bit of pop culture history so sublime that it makes it all worthwhile. **King v. Fox** is such a moment.*

On his Website, **Ed King** lays claim to having authored "the most famous riff in rock 'n roll history." A \$50 prize from the meagre **ATG** treasury will go to the first alert reader to identify that riff with a "reasonable degree of specificity."

**Edward King** was a California teenager in a garage band called **Six Pence**. It was the time of the **British Invasion**. The **Beatles** and the **Stones** on **Ed Sullivan**. **Yardbirds**. **The Animals**. You get the angle.

Being Californians, they caught the vibes of psychedelia early and changed their name to — **The Strawberry Alarm Clock**!

*I know. You're just as overwhelmed as I was. The one-hit psychedelic bubble-gum band of "Incense and Peppermints" fame. It was 1967, the height of Flower Power. It's America and commerce had to cash in on the counter-culture. As TV grappled with capturing the Boomer demographic, the Alarm Clock scored appearances on the **Jonathan Winters Show** and **Rowan & Martin's Laugh-In**.*

*Yes, sock it to me! And that's not all. A brief moment as themselves singing in that ultimate Hollywood shlock "Beyond the Valley of the Dolls."*

*The pop cultural significance of this is just over the top. Indeed so much so that "Incense and Peppermints" was used in 1997 in the first **Austin Powers** movie as an instant emblem of a bygone era.*

But our story has barely begun. Come 1969-70 and the Boomers all graduated from college. Psychedelia died hard. **King** and the one-hit band toured dingy clubs as an opening act for total unknowns. One fateful night they opened for a then obscure something called **Lynyrd Skynyrd**. What a juxtaposition. A true bridge

in rock history.

*Yes, what is the point of that name? **Leonard Skinard** was a gym coach in Jacksonville, Florida who nagged the boys about the length of their hair and gave them the excuse to quit school.*

**Ed King** had a way with a guitar. Soon to be legendary **Ronnie Van Zant** spotted this talent and recruited him for **Skynyrd**. Soon thereafter, **King** went into a recording studio with his new colleagues, they all ante'd up some creativity and walked out with a track called "Sweet Home Alabama." Southern Rock was born.

*I know. I know. **The Allman Brothers** date back to at least 1968 and **Duane** had managed heroin addiction and death by motorcycle by 1971. But the line sounded good.*

Anyhow, for **Skynyrd**, the year was 1972, and **King** rode the wave to the crest, playing guitar and co-writing mega-hits. But **King** was a Californian after all, and the hard partying and physically violent inter-band conflicts of Southern rockers got to him. In 1975 he quit the regimen of drugs, booze and demolished hotel rooms.

*In one great footnote of the history of rock violence, **Skynyrd** was set to open for **The Who** and was warming up by having a dressing room drunken brawl. **Pete Townshend** naively walked through the door nattily outfitted in his show-time velour suit to be doused from head to toe by a pitcher of beer. Those playful redneck rockers.*

Under the **MCA** recording contract, **King** was entitled to writer's and artist's royalties but he got zilch after he left because his royalties along with other band members' had been used to do a \$1 million buy-out of the former band manager **Al Cooper**.

At the time, the band was making around a million a year, and **King** was entitled to roughly one seventh of that.

Hard up for moola, **King** consulted famed New York entertainment lawyer **Allen Grubman** who told him he would need a litigator. **Grubman** got **King** an advance on royalties and took one third as his fee. Then he passed **King** along to his old law school classmate **Lawrence Fox**.

**Fox** was a litigator all right, but the personal injury kind, and he openly admitted he "knew nothing about [the entertainment] field." Like so many clients, **King** lacked any shred of docu-

mentation showing what he sensed he was owed.

**Fox** phoned the **Skynyrd** attorney who said **King** was owed nothing because he quit the band, and in fact owed the band money — and also declined to provide any paperwork on **King's** contract with **MCA**.

On the next **King/Fox** meeting, the issue of the fee came up. Like so many clients, particularly rock 'n rollers who have quit a band, **King** said he had no money. Being a personal injury type lawyer **Fox** proposed the old one-third contingency which every client adores initially. No up-front money. Lawyer gets nothing if he loses.

But of course the dispute will always come. It's just a question of when.

*As **John Travolta's** partner says in "A Civil Action:" "The minute the money goes down on the table there's trouble."*

**King** says he thought it was one-third of the accumulated back royalties; **Fox** says the deal was one-third forever. The contingency agreement that **King** signed read "1/3 of the recovery."

*How's that for ambiguous?*

With his fee secure, **Fox** got his hands on the **MCA** contract which predictably said **King** could get his royalties without going through the band and that quitting the band was not grounds for suspension of royalties.

***MCA** does after all have considerable experience with band members quitting.*

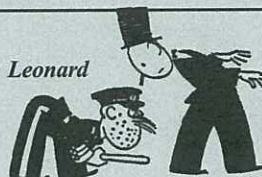
Despite the fairly plain face of the contract, **Fox** decided to sue **MCA**. **Fox** claimed **MCA** "put in a vigorous defense." Despite this alleged resistance, **MCA** agreed to pay **King** everything he was owed which was \$213,000.

*Remember, these are 1978 dollars when I began the drudgery of college teaching for \$18,000 a year.*

Next, **Fox** casually mentioned to **King** that the deal was a third forever, and while **King** was "shocked," like all clients he wanted to get his hands on money and "put it on the back burner."

In 1981, **King** asked **Fox** to represent him in a dispute with **MCA** over the "Muscle Shoals Masters" — guitar over-dubbing by **King** of **Skynyrd** songs from before **King** joined the band. **Fox** again sued, and settlement was

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reached giving **King** his royalties. No fee was discussed, both **King** and **Fox** assuming it was covered under the original agreement.

Fast forward to 1986 when the issue was again discussed. **Fox** was representing **King** in a dispute with the estates of former **Skynyrd** members.

*Yes, Southern rockers will die young. In 1977, Ronnie Van Zant, Steve Gaines and Cassie Gaines went down in a rented plane when it ran out of fuel and ploughed a 500 foot swath through a swamp near Gillsburg, Mississippi. Allen Collins survived, but killed his girlfriend in a drunk driving car crash and was himself paralyzed to soon die of pneumonia.*

In the meantime, **Fox** had been taking a third of writer's and artist's royalties even though the original dispute had been only over artist's. The check would go from **MCA** to **Fox** who would take out his third and forward the rest to **King**.

**King** claims **Fox** told him the fee arrangement was "approved by the Judge or whatever, and he said he (**Fox**) couldn't change it if he wanted to."

And as a typical client, **King** never asked for a copy of the court order.

And **Fox** denies having said the above.

In 1987, **King** wrote a letter to **Fox** telling him to quit taking fees from the writer's royalties and **Fox** agreed. But he didn't return any writer's royalties he had previously taken.

In 1991, **King** was in the hospital for congestive heart failure. By chance an **MCA** clerk contacted him to verify his address, and for some reason began sending all checks directly to **King**. Which meant **Fox** wasn't taking a third.

**Fox** called demanding his fees in 1997, and **King** like all clients said he didn't have the money.

In 1997, **King** got a new lawyer who told him **Fox** had been ripping him off and sued, saying the agreement was unconscionable. The District Court gave summary judgment to **Fox** holding that **King** had ratified the agreement.

### Unconscionability

"That which is bargained for by the promisor and given in exchange for the promise by the promisee is not made insufficient as a consideration by the fact that its value in the market is not equal to that which is promised." **Corbin on Contracts § 127.**

## In Indian Territory from page 58

secondary to the original accounts, but they are in many cases primary sources in their own right. Starting in 1983, every word of every journal kept during the expedition was published in an 11-volume edition by the University of Nebraska, and its edition includes a folio volume that reproduces the manuscript maps that were long the best available.

From where the Missouri River enters the

*Boy that put you to sleep. And here you thought we were talking about rock 'n roll.*

That turgid sentence is **Corbin** struggling to say that inadequacy of consideration is not a ground for the rescission of a contract. In a free market, buyer and seller meet and strike their bargain. Absent fraud, duress or mistake they are bound by their decision as to the worth of what they are swapping. Of course with the law there are always exceptions, one being the unconscionable contract.

**UCC-2-302** provides that the court as a matter of law may find a contract to be unconscionable thereby opening up an infuriatingly vague area of law. "The court" and "as a matter of law" mean this is a judge question on law and not a jury question on the facts of the case.

*And what the heck does the big word mean? Unconscionable. Against conscience. Oo-kay.*

Then it's divided into procedural and substantive. Procedural unconsc. consists of dirty tricks in the making of the contract which are so indistinguishable from fraud that I question whether this area of law needs to exist at all.

Substantive is a question of the unfairness of the contract. Sometimes courts babble about unequal bargaining power which has never made sense to me because **Exxon** has to deal with its gas stations and the contracts can't be unfair purely because of the unequal size of the parties.

In the more comprehensible cases, there will frequently be a limitation of remedy for breach which on the surface seems fair but turns out to be no remedy at all. Yarn seller provides in his standard form contract that textile mill must inspect the yarn and inform him of defects within six days. Then seller will replace the defective yarn as the sole remedy. But to discover the defects, mill must weave a sweater and wash it to see if the dye runs. Which takes more than six days. So buyer has no real remedy at all. Unconscionable.

In our current case, the issue seems to be one of the size of the attorney's fee vis-à-vis work done with maybe some ambiguity and/or trickery in the making of the contract thrown in. The justification for the old one-third is the lawyer is taking a high risk of getting nothing. **King's** cases seem to have been pretty much easy lay-ups.

### Ratification

**Fox** claimed **King** ratified the agreement by not challenging it and by continuing to employ **Fox**. The Second Circuit said in a normal contract case the eight years between 1978 and 1986

would be enough to show ratification. See, e.g., *Benjamin Goldstein Prods., Ltd. v. Fish*, 198 A.D. 2d 137 (1st Dep't 1993) (holding that a party's knowing acceptance of benefits from a contract for more than a year after the agreement was executed constituted ratification, and barred the party from alleging economic duress in the execution).

### But Attorney's Fees Are Different

Attorney's fees are held to a higher standard than run-of-the-mill contracts as courts have always held authority over legal fees under "inherent and statutory power to regulate the practice of law." *First Nat'l Bank v. Brower*, 42 N.Y.2d 471, 474, 368 N.E.2d 1240 (1977).

New York law puts the burden of proving conscionability of attorney's fees on the attorney. *Greene v. Greene*, 56 N.Y.2d 86, 92, 436 N.Y.S.2d 46, 49 (1982).

To find unconscionability, the court must explore all facts and circumstances of the agreement including the parties' intent and value of services in proportion to the fee. See *Gross v. Russo*, 47 A.D.2d 655, 655, 364 N.Y.S.2d 184, 186 (2d Dep't 1996.)

There's no "magic number" that pushes the deal into unconscionability, fifty percenters having been upheld. See, e.g., *Beadwear, Inc. v. Media Brands, LLC*, No. 00 Civ. 5483, 2001 U.S. Dist. Lexis 20927, (S.D.N.Y. Dec. 18, 2001).

In *Shiya v. Nat'l Comm. of Gibran*, 381 F.2d 602 (2d Cir. 1967) the lawyer **Shiya** was employed by the estate of **Khalil Gibran** to secure renewal copyrights for a 25% cut. There was heavy litigation and still more over whether **Shiya** was entitled to a cut of future royalties or just accumulated ones. The agreement was held ambiguous, but both parties agreed the "prize sought... was the full fruits of the renewal copyrights." *Id.* at 607.

*Yes, you've squirmed through contrived wedding ceremonies where bride and groom pledged their troth by reading Khalil. You've heard the ghastly poems, now read the appeals case.*


But the Second Circuit found a distinction in that **King** claims deception and the sheer amount of **Fox's** fee — \$500,000 "for modest work." These facts could lead to a finding of unconscionability.

And if it is unconscionable, can the client ratify it? Old New York cases — we're talking 1879 type old — seem to say it can be. See *Kent v. Quicksilver Mining Co.*, 78 N.Y. 159, 190 (1879) ("An unconscionable arrangement will not be disturbed when there has been ratification of it with knowledge of all its bearings, after time has been had for consideration."). And then there are similar cases from 1927 and 1932.

But none of that involved attorney-client agreements.

So, they "certified" it to the New York Court of Appeals to answer the question of whether a client can ratify an unconscionable attorney's fee agreement.

*The mills of the law grind slowly.*

And so we wait for the New York Court of Appeals with bated breath. 

Mississippi to where the Columbia River enters the Pacific, the nations of Indians encountered by **Lewis** and **Clark** were recorded in more detail than had previously been done and in some cases that could be done afterwards. Many individual tribes were later recorded in greater detail, but with increasingly less of their original cultures intact.

### George Catlin's "North American Indians," 1832-1839

**Catlin** single-handedly created the most ac-

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